No. 20,302

IN THE

United States Court of Appeals

For the Ninth Circuit

CAPITAL INSURANCE & SURETY COMPANY, INC.,

Appellant,

vs.

JOHN V. KELLY as an individual, JOHN V. KELLY as an heir to the estate of Marjorie A. Kelly, deceased, JOHN KELLY, a minor, and DON V. KELLY, a minor, both heirs to the aforesaid estate, by and through John V. Kelly, their father and next friend,

Appellees.

On Appeal from the District Court of Guam for the Unincorporated Territory of Guam

APPELLEES' BRIEF

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STATEMENT OF THE CASE

Appellees adopt the statement of the case set out in appellant's opening brief in its entirety.

QUESTION PRESENTED

May an insurance company in Guam avoid liability for the torts of its insured where said insured died prior to the institution of action against him?

ARGUMENT

Both the trial court in its opinion and appellant in its brief have set out verbatim the Guam direct action statute, § 43354 of the Government Code of Guam. This section was inspired by a similar section in the Louisiana codes, La. R.S. (1960), § 22.655.

A general review of the laws pertaining in the various jurisdictions to direct action against insurance carriers by injured third parties and motor vehicle financial responsibility laws discloses that the law in these fields is almost as diverse as the number of states and territories under the American flag. Many states now have financial responsibility laws, some more stringent than others, with all subject to ever increasing modification toward the ultimate goal of compulsory insurance or compulsory evidence of financial responsibility. A number of jurisdictions now have statutes permitting direct action against insurance carriers by third parties, most of them limited in scope. In a few evolution has proceeded at a faster pace, and public policy has broadened in the areas in which direct action against insurance carriers operates. Louisiana, previous to Guam, has the most highly developed direct action statute, and in its pres-

ent form it is La. R.S. (1960) § 22.655. Louisiana also has had a regulatory code pertaining to insurance in effect for many years. Guam had no such code until 1962. However, when the legislature of Guam saw fit to enact into law an insurance code for Guam, it took from numerous jurisdictions ideas which it felt to be appropriate to the needs of Guam at the time, and among previously developed statutes from other jurisdictions it selected as a model the above described direct action statute of Louisiana. This is only one of many instances where the legislature of Guam has deviated from the traditional adaptation of the Guam codes to those already existing in California.

In recent years the Guam legislature has to a far greater extent struck out on its own, seeking inspiration from many jurisdictions and relying to an ever lesser degree on California. While appellees will agree with appellant and the trial court that the Guam codes, as originally adopted from California in 1933, contained no law permitting a tort to survive the death of the tort-feasor, Guam has diverged widely from California statutes and precedents since that date. In turn, where so many statutes of purely local application are being modeled upon statutes of many and divers jurisdictions, it is necessary that Guam be permitted to build its own body of precedent upon those statutes reasonably free from the influence of the courts of distant jurisdictions whose decisions do not fit the desires or needs of the residents of Guam.

It is certainly within the authority of the legislature to enact statutes pertaining to the survival of

certain causes of action. Although a few jurisdictions have enacted comprehensive statutes in this area, most have had a tendency to do it piecemeal as particular harsh or unjust aspects of the common law have been brought to the attention of the lawmakers. Where such statutes are enacted they should be construed liberally, and this is especially true in Guam where sections 4 of the Civil Code and the Code of Civil Procedure read as follows:

> "§ 4. Rules of construction. The rule of common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this Territory respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

Guam is an island over six thousand miles from the American mainland. It has much of the overlay of American civilization, but it also has problems that are unique to its isolated position. Over one-half of the total population in Guam represents the United States military services and their dependents, and these people and their motor vehicles crowd the island's few highways. These military people are transients in the truest sense. They come and go and they never become a part of the local scene. Their automobiles are shipped into Guam by a benevolent government and, if they so desire, they are again shipped out in the same fashion. For the most part they live inside military reservations. They are difficult to locate, and

it is virtually impossible at any time to determine whether individuals among them are still within this jurisdiction or whether they have departed. A large percentage of them are young and financially irresponsible. As to this last point, the same thing can be said of a greater percentage of the local drivers who use the highways of Guam. Obviously the legislature of Guam was aware and took action to protect the general public in the light of this overall situation. The financial responsibility law, coupled with the direct action statute, was designed to alleviate a situation which had been building up over the years as the number of motor vehicles continued to burgeon on the island roads and the number of unredressed injured persons reached ever-increasing heights.

Truly, under the circumstances, these laws must be classed as statutes of purely local application designed for local need. The District Court of Guam in this case has recognized them as such and has interpreted them within the framework of what the legislature must have had in mind, together with the actual need of the populace for these statutes.

Thus, within this context, the opinion of the trial court in this case must be scrutinized in the light of previous decisions of this Court, where, in *Gumataotao v. Government of Guam,* 322 F.2d 580, 582 (9th Cir. 1963) and *Perez v. Herrero,* 333 F.2d 1014 (9th Cir. 1964), following a long-standing and consistent body of law, this Court found that in order for the decision of the trial court to be reversed there must be clear and manifest error and conclusions and in-

terpretations that are inescapably wrong and obviously erroneous.

The appellant herein has invoked the law and decisions of many jurisdictions, but none of the laws is identical to those upon which the trial court has based its decision, and especially none of them is in the same context of other law as are these applicable code sections in relation to other local law. Case law cited by appellant is only persuasive of the fact that it represents many other jurisdictions which are or may be in a different phase of evolution or development. Most of these jurisdictions are bound by more than a century of legislative and judicial tradition, whereas Guam has practically none. Guam is evolving a body of statutory law and precedents which actually stretch back for less than fifteen years. In starting afresh the Guam legislature should be able to attack its problems without restraint from unreasonable outside influence and with its particular knowledge of local needs. Likewise, the Guam courts should be able to interpret local law relatively free from influence of hide-bound decisions of more ancient jurisdictions.

In the instant case this makes good law and good sense. The defendant insurance company has admitted the responsibility of the deceased driver. Investigation discloses for the benefit of all parties that there was no question as to who was at fault in the accident. Had defendant's insured survived, without doubt defendant would have settled this claim promptly and in substantially the amount stipulated to herein. It is extremely doubtful that a casualty company takes

into its actuarial computations the possibility of an assured being killed in a given number of accidents, thereby lessening the company's exposure because of the abatement of possible actions against deceased assureds. Without doubt, if such an actuarial policy had existed, defendant in this case would have brought it forward as an additional reason to avoid liability. Where it did not, it must be assumed that no such policy existed and therefore defendant certainly lost no substantive right by being held in this case. We must assume that it received a standard premium, and to this extent it cannot claim hardship if it is required to answer according to the terms of its policy as modified and extended by local law.

CONCLUSION

The Direct Action Statute of Guam gives an injured party an immediate right of direct action against the insurer of the guilty tort-feasor which cannot be defeated by the defense of abatement on the death of such tort-feasor. The trial court properly applied the rule of liberal construction to the applicable statutes raised. Certainly if an injured person has such an immediate right of action against the insurance carrier upon the happening of the event, that right should become fixed and not defeated by the artificial intervention of the death of the tort-feasor. Both the financial responsibility law of Guam and the direct action statute were designed for the protection of the public. By law they are a part of every lia-

bility insurance policy written in Guam or applicable to Guam. Their effect should not be weakened by artificial considerations. The judgment of the trial court should be affirmed.

Dated, Agana, Guam,
February 10, 1966.

Respectfully submitted,
E. R. Crain,
Attorney for Appellees.

Certificate of Counsel

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. R. Crain,
Attorney for Appellees.